EX PARTE OR LATE FILED

Law Offices

BESOZZI, GAVIN & CRAVEN

1901 L Street, N.W., Suite 200
Washington, D.C. 20036

Telephone: (202) 293-7405
Facsimile: (202) 457-0443

Stephen Diaz Gavin
(Admitted in Pennsylvania)

September 16, 1994

B. Solomon
PVI Re: 800 mtg freeze

HAND DELIVERED

William E. Kennard, Esquire
General Counsel
Federal Communications Commission
1919 "M" Street, N.W. Room 614
Washington, D.C. 20554

Re: GN Docket No. 93-252

Dear Bill:

I am writing to advise you about an issue concerning several clients who, in good faith reliance on the Commission's long-standing rules, filed applications for 800 MHz Specialized Mobile Radio ("SMR") licenses based upon the rules then existing, which provided for processing on a first-come, first-served basis. Most of those applications have been pending for nearly one year. The majority of the applicants are female-owned and controlled. Generally, the applicants are small enterprises attracted to the expanding opportunities in wireless communications.

Although we had hoped that the Commission was poised to release the text of its *Report and Order in GN Docket No. 93-252* as long ago as last Friday and proceed with the processing of the pending SMR applications, the delay in the release of the text has renewed our concern that the Commission will open up those first-come, first-served applications to mutual exclusivity.

I have enclosed copies of *Ex Parte* presentations that we have made to Chairman Hundt and Commissioner Ness' office. Both presentations lay out in detail the legal foundations of our concerns, which we have also communicated to the principal architects of the 1993 *Budget Act*.

I shall be calling you later today to request a meeting to discuss these concerns.

Very truly yours,

Stephen Diaz Gavin

Enclosures
0806/kennard.ltr

EX PARTE OR LATE FILED

Stamp - in

Law Offices

BESOZZI, GAVIN & CRAVEN

1901 L Street, N.W., Suite 200
Washington, D.C. 20036

Stephen Diaz Gavin
(Admitted in Pennsylvania)

Telephone: (202) 293-7405
Facsimile: (202) 457-0443

August 31, 1994

David R. Siddall, Esquire
Legal Advisor to Commissioner Susan P. Ness
Federal Communications Commission
Room 826, Stop Code 0104
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation - GN Docket 93-252

Dear Mr. Siddall:

On behalf of the Law Firm and its 800 MHz Specialized Mobile Radio ("SMR") clients, I wish to thank you for taking the time to meet last Thursday with me and my colleague, M. Tamber Christian, to review our position on the matters previously set forth in our letter of August 18, 1994, to the Honorable Susan Ness.

As I explained during our meeting, this Law Firm represents several clients who, in good faith reliance on the Commission's long-standing rules, filed applications for 800 MHz SMR licenses. All of these applications were filed in the fall of 1993. The majority of the applicants are female-owned and controlled. Generally, the applicants are small enterprises attracted to the expanding opportunities in wireless communications.

This letter will address three matters raised during our meeting:

- Regulatory Parity: Although the provisions of the 1993 Budget Act require the Commission to regulate the conduct and operations of cellular telephone, PCS and SMR operators on a similar basis, *there is no requirement that those services be licensed in an identical manner.*

- July 26, 1993 Cut-off Date: This date applied to mutually exclusive applications to be selected by random selection, *not* to applications filed for authorization on a first-come, first served basis *without any expectation of mutual exclusivity.*

- Distinctions Among Pending SMR Applicants Will Only Delay Already Protracted Disposition Of Pending Applicants. To begin at this late date to distinguish between those SMR applicants who propose dispatch *vs.* commercial mobile services will only delay the disposition of many hundreds of pending applications. Plus it would make them "second class" licensees.

A. Regulatory Parity

The Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (the "*Budget Act*"), in addition to providing the Commission with authority to license certain radio services *for which*

there were mutually exclusive applications on the basis of competitive bidding, *see*, Letter to the Hon. Susan B. Ness, pp. 1-2, provided that all persons engaged in the provision of commercial mobile service be treated as common carriers. *Budget Act*, § 6002(b)(2)(A), 47 U.S.C. § 332(c)(1).

The *Budget Act* also required that the Commission enact such rules as were necessary for regulation of all commercial mobile services, including SMR, "to assure that licensees in such service are subjected to *technical* requirements that are comparable to the *technical* requirements that apply to licensees that are providers of substantially similar common carrier services." *Budget Act*, § 6002(d)(3)(B) (emphasis supplied).

Although it is plain that Congress intended that commercial mobile service providers be *regulated* on the same basis under Title II of the Communications Act of 1934, as amended (the "Act"), it does not therefrom follow that Congress intended that all such services be similarly licensed by competitive bidding.

There is no precedent that applications in services governed by similar provisions of the Act be *licensed* in an identical manner. For example, in the broadcast services, AM and TV applicants are subject to cut-off list selection. If there is no mutually exclusive filer by the cut-off deadline, then the AM or TV applicant is eligible for grant. FM radio applicants can only file during the opening of a relevant window; mutually exclusive applicants are subject to trial-type comparative hearing, with full cross-examination rights. 47 U.S.C. § 309(e). However, if there are no applicants during the relevant window, then the Commission will grant applications on a "first-come, first-served" basis.[1/] By contrast, LPTV applicants are subject to random selection lotteries. Yet a different selection regimen is employed for selection among mutually exclusive ITFS applicants, who are subject to "paper hearing" selection procedures. Nevertheless, the Commission regulates all these media services under the regulatory standards of Title III of the Act.

Moreover, as noted above, the *Budget Act* does not require regulatory equivalence in all respects among commercial mobile service providers. It allows the Commission to conclude that "differences in the regulatory treatment of some providers of commercial mobile services" are justified. See, House Rep. No. 213, 103d Cong., 1st Sess., August 4, 1993, at 491 ("Budget Act Conference Report"). Thus, Congress left the Commission free to conclude that some provisions of Title II of the Act would apply to some providers of commercial mobile services and not to others. Budget Act Conference Report, supra, at 490-491.[2/]

In the case of the pending SMR applicants, all of the Law Firm's client applicants filed in reliance upon the provisions of the Commission's Rules that provided for grant upon a first-

---

1/ *See* Roger Wahl, 8 FCC Rcd 980 (1993).

2/ The *Budget Act* merely provides that all commercial mobile service providers be subject to "*technical* requirements that are comparable to the *technical* requirements that apply to licensees that are providers of substantially similar common carrier services." *Budget Act*, § 6002(d)(3)(B) (emphasis supplied). Nothing in the Budget Act Conference Report suggests that Congress intended to extend this provision governing technical requirements to a licensing regime. *See* Budget Act Conference Report, pp. 497-98.

come, first-served basis. As previously pointed out by the Law Firm, Letter to Hon. Susan Ness, p. 4, n. 2, returning those SMR applications or subjecting them to mutually exclusive applications after they obtained "cut-off" protection raises serious questions of arbitrary and capricious action. *See* McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351 (D.C. Cir. 1993). Such a concern for the situation in which *pending* applicants find themselves influenced the Commission's decision to proceed with the selection of cellular mutually exclusive "unserved area" applicants by lottery.

Thus, it would appear that the Commissioners' concern that the *Budget Act* compels a shift to competitive bidding among *pending* SMR applicants is unfounded.

B. July 26, 1993 Cut-Off Date

Another concern that you raised during our meeting was the limitation of protection to pending applications from being changed to competitive bidding selection was that the *Budget Act* limited such protection to applications pending on July 26, 1993. Of course, our SMR clients filed their applications after that date.

Section 6002(e) of the *Budget Act* provides that the Commission is restricted from issuing any license or permit pursuant to Section 309(i) of the Act, *i.e.* by lottery.

The Law Firm does not believe that the July 26th reservation in the *Budget Act* applies to the SMR applicants because they filed as first-come, first-served applications, not as mutually exclusive applications to be selected by lottery.[3/] This interpretation is confirmed by the Budget Act Conference Report, wherein the *Budget Act* managers confirmed that the provision was intended in large measure to deal with the nine IVDS markets and certain other services for which applications were already on file at the time of the enactment of the *Budget Act* and were subject to lottery procedures.[4/]

C. Delay Attendant To Creating Distinctions Among Applicants

During our discussion, you raised the possibility of a carving-out from any changes in the processing rules of pending SMR applicants that would be proposing traditional dispatch service, which by definition is not common carrier service, and not require regulation as a commercial mobile service provider.

The delays that would be caused by requiring already limited resources in the Private Radio Bureau to examine each pending SMR application make this a practical impossibility.

3/ In the case of the IVDS applications, we have confirmed that the last of the three windows for the top 9 markets closed in September 1992. No markets that were subject to the July 28 and 29, 1994 auctions had been included in the top 9 IVDS markets.

4/ "This provision will permit the Commission to conduct lotteries for the nine [IVDS] markets for which applications have already been accepted, and several other licenses. This provision does not permit the FCC to conduct lotteries of applications that were not filed prior to July 26, 1993." Conference Report, pp. 498-99.

In our opinion, such a bifurcated approach to the pending SMR applicants at this late date would prove an administrative nightmare and waste of already taxed Private Radio Bureau resources in order to review the pending applications solely to determine whether they would be exempted from any change in the processing rules. Those resources would be better spent by completing the processing of the existing applicants and proceeding to grant of their authorizations.

In addition, this would unfairly restrict the legitimate uses to which these licenses might be put. Such a bifurcation would make the carved-out licenses, in a way, "second class," unable to take advantage of the authority available to other licensees on these frequencies. It would be, in our view, a device to do indirectly, that which the *Budget Act* and principles of administrative law prohibit the Commission from doing directly.

* * *

We urge the Commissioners to consider the problems they would create by any change in the processing rules for the first-come, first-served SMR applicants.

As we noted in our August 18th letter to Commissioner Ness, (1) the *Budget Act* specifically prohibits using auctions solely for expectations of revenues and encourages the Commission to avoid mutually exclusive application situations; (2) the retroactive application of new selection procedures to pending applicants would violate established principles of administrative law; and (3) the return or retroactive susceptibility to mutually exclusive applications would constitute a prohibited lack of notice to pending applicants.

The licensing of the pending SMR applicants is one of the Commission's last opportunities to provide small entrepeneurs the ability to compete, albeit on a small scale, with larger mobile service providers. It would disenfranchise many minority and female-owned applicants, people whom the *Budget Act* specifically intended to be helped by the Commission. The Commission must weigh these concerns and statutory duties carefully.

In our opinion, the *Budget Act* does not compel the Commission to choose from among applicants in different mobile services in the same way. Moreover, the July 26, 1993 date has no significance for the 800 SMR applicants, nearly all of whom were <u>not</u> mutually exclusive in their applications.

We urge the Commission to continue the processing and grant of the pending 800 SMR applications.

Very truly yours,

BESOZZI, GAVIN & CRAVEN

By: _____
Stephen Diaz Gavin

cc: Paul C. Besozzi, Esquire
0806/siddall2.ltr

Stamp - in

Law Offices

BESOZZI, GAVIN & CRAVEN

1901 L Street, N.W., Suite 200
Washington, D.C. 20036

Telephone: (202) 293-7405
Facsimile: (202) 457-0443

August 18, 1994

Honorable Reed E. Hundt
Chairman
Federal Communications Commission
Room 814, Stop Code 0101
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation - GN Docket 93-252

Dear Mr. Chairman:

This law firm represents several clients who, in good faith reliance on the Commission's long-standing rules, filed applications for 800 MHz Specialized Mobile Radio ("SMR") licenses. Some of these applications were filed as long ago as in the fall of 1993. The majority of the applicants are female-owned and controlled. Generally, the applicants are small enterprises attracted to the expanding opportunities in wireless communications.

Last week the Commission announced its intention to issue a Further Notice of Proposed Rulemaking in Docket PR 93-144 to further assess a framework for licensing 800 MHz SMR systems on a "wide-area" basis. Pending the completion of that Rulemaking the Commission announced the suspension of "acceptance of new 800 MHz SMR applications...."

The Commission's News Release did not address the matter of already pending 800 MHz SMR applications. However, our clients have been led to believe that the Commission is considering permanently suspending the processing of these applications (or even returning them) to switch in midstream to competitive bidding procedures for selecting among mutually exclusive initial applications in the 800 MHz band. These SMR applicants filed on the basis of rules providing for licensing on a first-come, first-served basis. These pending applications generally are not mutually exclusive.

Our clients strongly oppose any decision to suspend processing or return these applications, or to subject them to selection by auction among mutually exclusive applicants as grossly unfair and legally untenable for the following reasons:

1. Such A Decision Would Flv In The Face Of Two Kev Provisions Of The Omnibus Budget And Reconciliation Act of 1993 ("Budget Act")

The Budget Act proscribes the Commission from deciding to employ auctions "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding...." 47 U.S.C. § 309(j)(7)B). The House Budget Committee, in approving a similar provision, stated:

> "The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so. The ongoing MSS (or "Big LEO") proceeding is a case in point. The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate."

House Rep No. 111, 103 Cong., 1st Sess., May 23, 1993, at pp. 258-259 (emphasis supplied). It would appear that the Commission here is considering exactly the opposite of what the Congress encouraged because the pending SMR applications are generally not mutually exclusive. In the immediate instance, under the existing licensing rules for 800 MHz SMR, licenses are granted to applications on a first-come first-served basis.

A second Budget Act provision relates to one of the specific statutory requirements for implementation of competitive bidding. In designing systems of competitive bidding the Congress required the FCC to further the following objective (among others):

> "[P]romoting economic opportunity and competition and ensuring the new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women."

47 U.S.C. 309(j)(3)(B); see, House Report No. 111, 103rd Cong., 1st Sess., May 25, 1993, at p. 254 ("[U]nless the Commission is sensitive to the need to maintain opportunities for small businesses competitive bidding could result in a significant increase in concentration in the telecommunications industries.") Yet by suspending the processing of (or returning) these applications, the Commission is merely giving large, deep-pocketed companies the opportunity to buy frequencies that many of these "little guy/gal" applicants identified and filed for on a first-come, first-served basis months ago.

2. The Harm Derived From Retroactive Application Of The Commission's Licensing Rules Would Far Outweigh Any Perceived Public Benefit

Retroactive application of agency regulations is disfavored where it would have the impact projected here.

> "Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application...or when the hardship on affected parties will outweigh the public ends to be accomplished."

Iowa Power and Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. den., 455 U.S. 907.

The United States Court of Appeals for the District of Columbia Circuit has stated that the relevant factors in determining whether regulatory retroactivity is permitted include "the degree of retroactivity, the need for administrative flexibility and the hardship on the affected parties." Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116, n. 77 (1979), cert. den., 445 U.S. 920; see, Summit Nursing Home, Inc. v. U.S., 572 F.2d 737, 743 (Ct. Cl. 1978). (Court must compare the public interest in the retroactive rule with the private interests that are overturned by it).

Here the applicants have spent very significant sums of money on engineering, frequency coordination and application fees, not to mention their own uncompensated time and energy. Many of these applications are in smaller markets or more rural areas of the country. The major market frequencies are already controlled by the larger SMR providers.

The decision in Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1251 (D.C. Cir. 1987) does not support a Commission decision to suspend processing or return these applications. In Maxcell, the Court was faced with a challenge to the FCC's decision to apply lottery procedures to cellular applications originally filed under comparative licensing rules. The Court assessed whether the "ill effect of the retroactive application of the rule outweighed the mischief of frustrating the interests the rule promotes." The Court supported the Commission's overriding concern with the efficient processing of hundreds of mutually exclusive applications for cellular licenses. Moreover, the Maxcell court noted that the applicants had been aware at the time it filed its application that a lottery scheme might be used to select among competing applicants. In summary, because the applicants had "suffered neither the deprivation of a right nor the imposition of new and expected liabilities or obligations, [they had] not suffered any significant injury from the retroactive effect of the lottery procedure."

The Maxcell situation is clearly distinguishable from the case at hand. In Maxcell the Commission did not return the applications or allow additional applications to be filed. Unlike Maxcell, these SMR applicants had no notice or expectation that applications not mutually exclusive and, therefore, not subject to the competitive bidding statute would be suspended or returned for the express purpose of allowing competitive bidding. Further, the SMR applicants would be subject to new and unexpected liabilities in the form of auction payments. Retroactive application of whatever wide-area SMR licensing rules might be adopted cannot be legally sustained under this standard.

Furthermore, retroactive changes in the SMR licensing rules, which would effectively wipe out investments made in reliance upon cut-off protection afforded by the Commission's policy of first-come, first-served processing, are prohibited by general principles of administrative law.

The U.S. Supreme Court has held that retroactivity in formal rulemaking proceedings is inherently suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). *See also*, Health Insurance Association of America, Inc. v. Donna E. Shalala, No. 92-5196 (May 13, 1994). Retroactive application of a rule requires specific statutory authority for such retroactivity. Bowen, *supra*, at 213. Nothing in either the Communications Act or the Administrative Procedure Act would support a retroactive change in the rules governing the process and licensing of the SMR applications.[1/] As the Supreme Court noted in Bowen:

[1/] In Maxcell, *supra*, which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to

> It is axiomatic than an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. There is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the radio licensing provisions applicable to SMR licenses, Sections 307 to 309 and Section 332, 47 U.S.C. §§ 307-309, 332, to justify the retroactive imposition of new burdens on applicants that have filed their applications based upon an expectation of cut-off protection from mutually exclusive applicants because they were filed on a first-come, first-served basis.[2/]

In addition, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act. The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). GN Docket 93-252 is by definition a notice and comment rulemaking proceeding. Thus, retroactive changes in the rules eliminating the cut-off protections of the pending SMR applications would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). Retroactive changes in the rules to allow for mutually exclusive applications would impose retroactively a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon rules and policies then in effect. Such retroactivity is prohibited by the APA.

3. Return For Retroactive Application Must Also Fail For Lack Of Notice

There is a clear line of court authority that before an FCC application is subject to the "grave sanction of dismissal" traditional concepts of administrative law require that the applicant be required to receive adequate notice of the substance of the rule which led to the dismissal. This doctrine has generally been applied where an application was dismissed by the FCC for not complying with a newly-announced standard when the "announcement" was not sufficient. See, Satellite Broadcasting Company v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987); Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985). In these cases the D.C. Circuit reversed FCC rejection of an application where the agency's rules were unclear. *See also*, McElroy Electronics v. F.C.C.,

---

eliminate application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, the SMR applicants have incurred substantial costs in preparation of applications that could be granted on a first-come, first-served basis. There was no expectation of being subjected to competitive bidding procedures because Congress specifically intended that its auction legislation only apply to mutually exclusive application situations.

[2/] The D.C. Circuit has previously reversed the dismissal of applications for unserved cellular service areas that had been filed in reliance upon cut-off protection afforded by the rules in effect when the applications were filed. McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351 (D.C. Cir. 1993). Otherwise qualified applicants in the private radio services that were properly cut-off are entitled to grant when there were no timely filed mutually exclusive applications. Reuters, Ltd. v. F.C.C., 781 F.2d 946 (D.C. Cir. 1986). The SMR applicants, provided that they are basically qualified, are now eligible for grant for the frequencies and locations for which they filed on a first-come, first-served basis. The Commission has explicitly recognized that a qualified application filed on the basis of first-come, first-served procedures is entitled to grant and protected from later-filed applications for the same frequency. Roger Wahl, 8 FCC Rcd 980 (1993) (FM application filed under first-come, first served provisions of 47 C.F.R. § 73.3573(g)).

supra. That argument may be applied by analogy here. There was never any notice that the Commission would decide to adopt a wholly-different licensing scheme and apply it retroactively to pending applications. The failure to provide such notice bars retroactive application of the licensing scheme.

* * *

A Commission decision, either directly or indirectly, to make these applicants start from scratch cannot be squared with these explicit legal principles. Therefore, whatever path the Commission may decide to take for future 800 MHz SMR applications, it should not force these applicants ex post facto down that same road.

Sincerely yours,

BESOZZI, GAVIN & CRAVEN

By: _____
Paul C. Besozzi
Stephen Diaz Gavin

PCB/SDG:lyt
0806/FCCmem.ltr